No. 89-206

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MEBA PENSION TRUST, *et al.*,
Petitioners

v.

JUAN RODRIGUEZ, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the act or omission jurisdictional requirement of § 514(b)(1) of ERISA satisfied by the Trustees' first interpretation of their Trust Plan denying the application for pension benefits of a recently-retired employee, when that interpretation was rendered in 1986 and based on many factors occurring after January 1, 1975?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes:

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STATEMENT OF THE CASE

Juan Rodriguez first went to sea in 1935 at the age of 20. He became a member of the Marine Engineers' Beneficial Association ("MEBA") in 1944. He retired from sea duty on May 1, 1965, whereupon, under MEBA Trust Regulations, he was entitled to a pension of $300.00 per month. After retirement, Rodriguez returned to his native Puerto Rico and, following some non-marine employment, took a job as a Port Engineer for Sea-Land Service, Inc. in 1967. At that time Port Engineers were not covered by any MEBA contract. Rodriguez was covered by Sea-Land's pension program for non-unionized employees. On June 16, 1968, Sea-Land concluded a collective bargaining agreement with MEBA as a result of

which Rodriguez's employment became unionized. Rodriguez received a letter dated August 30, 1968 from I. A. Lamy who was both Vice President of MEBA *and* a Trustee of the MEBA Trust. The letter instructed Rodriguez to apply for union membership. Rodriguez immediately wrote to Lamy on September 2, 1968, informing him that he was drawing a pension as a retired sea engineer and stating that this fact "raised a question in my mind as to what is my present status in the organization." By letter dated September 5, 1968, Lamy informed Rodriguez that he was nevertheless required to apply for reinstatement to union membership but that such "[m]embership will not interfere with your pension." The Lamy letter informed Rodriguez of *no* option to suspend his current pension checks in order to accrue further pension benefits.

The next month, on October 16, 1968, the MEBA Trust Regulations were amended for the purpose of giving newly unionized port engineers who were on early retirement from sea duty an option of either (1) suspending their pension payments and accruing further pension credit or (2) continuing to receive their pension. This option was deemed so important that by letter dated November 25, 1969, MEBA Vice Presidents were directed by MEBA President Calhoon to *personally* deliver a copy of the option notice to each Port Engineer in his area who was so affected, explain it to each one, and receive each one's written determination.[1] The record showed there were 25 such Port Engineers. The option notice was itself dated November 25, 1969, was a letter under the signatures of a Union Vice President, and contained an explanation of the option. I. A. Lamy was the Vice President whose signature appears on the option notice

[1] Petitioners state (Pet., p. 4) that this notice was "sent to affected beneficiaries by letter"—indicating the mail was the method of delivery. The record shows and the Court below found that the method was hand delivery with explanation from a union Vice President (Pet., p. 3a).

delivered to Port Engineers on the Atlantic Coast. No letter was ever given to Rodriguez, probably because he lived in Puerto Rico.[2]

By letter dated August 3, 1972, Rodriguez received a letter from Mildred Killough, then MEBA Trust Administrator, notifying him of a change in the pension law allowing a member to elect to receive a smaller pension at retirement so that his spouse might continue to receive pension payments in the event of his death, *i.e.*, a survivor option. Since up to this point all information given Rodriguez was that the unionization of port engineers had no effect whatsoever on him, and he was not covered by the MEBA Plan, the notice elicited an immediate response from Rodriguez. By letter of December 18, 1972, he wrote to Killough:

> I would like to clarify my status and to learn if my present employer is making any contribution to a pension fund when I retire from my present position. I would like to know if I am eligible to receive further pension benefits in addition to those I am receiving now on the basis of my present employment.
>
> Is there any provision made for additional pension benefits and if so who is to make the contribution and how much would it cost. Any information you

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[2] Petitioners pretend that they concede Rodriguez's non-receipt in a show of good sportsmanship—giving him "the benefit of the doubt and assum[ing] that his assertion was correct." (P. 4, n.2 and see also p. 27.) In fact, the finding of non-receipt did not depend solely or even primarily upon Rodriguez's statements. The discovery process revealed that the MEBA Trust kept (1) a file for each pensioner or participant, which had copies of *all* the correspondence between the Trust and the participant, and (2) a general "Port Engineer" file, which *also* kept copies of materials related to port engineers. Copies of the option letter to *each port engineer* on whom it was delivered, with each such engineer shown as an addressee, were found in each engineer's files. But *no* copy of the option letter with Rodriguez as an addressee was found in either Rodriguez's or the "Port Engineers'" file. Both courts below found as a fact that Rodriguez never received the notice. (Pet. 3a, 14a).

> can give me regarding my present situation will be appreciated.

By letter dated March 2, 1973, Killough responded. She said:

> As of June 16, 1968, Sealand Service became a participating employer for its Port Engineers. With respect to pensioners employed as Port Engineers on the date a company becomes a participant in the MEBA Pension Trust for its Port Engineers, the Regulations provide [she then quoted then Articles II-A, §§ 14(D) and (A).]
>
> This means that on June 16, 1968, you could have elected to have your pension benefits suspended in which case you could have accrued additional credits. Since you did not so elect, you continued to receive pension benefits and, accordingly, you could accrue no further credits.

Killough sent Rodriguez a copy of the Trust Agreement with her letter.

On January 1, 1975, Rodriguez began work for a new employer Puerto Rico Marine Management, Inc. ("PRMMI"), having ended his employment with Sea-Land the day before. Later in 1975 Rodriguez received a copy of a letter from his new boss, Capt. James Murray, indicating that his new employer, PRMMI, was making pension contributions to the MEBA Trust on his behalf. This was the first time since 1967 that Rodriguez had knowledge that any current contributions were being made for him to the MEBA Trust. He contacted a MEBA "patrolman," *i.e.*, union representative, Danny Colon since Colon periodically visited Puerto Rico, and asked him to resolve the apparent contradiction between the 1973 Killough letter and the new information. Colon advised that he would contact the MEBA Trust office, but despite repeated requests by Rodriguez of Colon, no advices were forthcoming. In 1982, in conjunction with a medical checkup, Rodriguez visited the MEBA office and

inquired whether or not he could accrue further benefits. He was again told that he had waived his rights on June 16, 1968, (although, as discovered only after this suit was filed, these rights did not even exist in June, 1968). In 1982, Rodriguez was told that he could bring further "proof" to the MEBA Trust, but Rodriguez said he had no proof beyond the MEBA correspondence.[3]

Unknown to Rodriguez until discovery in this case, during the years 1975 and 1976, the MEBA Trust reached agreements with three other port engineers, two of whom, like Rodriguez, had never received notice of their option and the third had formally elected in 1969 *not* to suspend and accrue but subsequently asked to reverse that situation.[4] Both of the port engineers who had not received notice of their options were allowed to pay back past amounts and accrue credits based on past employment: the stated rationale for these Trust actions was that *these engineers had never received notice of the option.* On August 31, 1976, the MEBA Trust concluded a survey it had done on the subject of "Pensioners Who Either Were Working As Port Engineers At the Time The Contracts Were Signed For Such Engineers or Who Worked as Port Engineers Subsequent to the Signing of Such Contracts." In that survey, Rodriguez was listed as

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[3] Petitioners state that Rodriguez "corresponded with the Trust on several occasions" in the 12-year period 1973-1985 (Pet. p. 5). The District Court referred to correspondence "over the years" (Pet., p. 15a) and the Court below referred to "correspondence on several occasions" during that same period (Pet. 3a). In fact, the record indicated *no* correspondence between Rodriguez and the MEBA Trust during the 12-year period that elapsed from the 1973 Killough letter and the January 15, 1985 letter wherein Rodriguez informed the MEBA Trust as to his contemplated retirement.

[4] Petitioners represent (pp. 6-7, n.4) that Rodriguez had "notice" of one of these paybacks. Rodriguez had no official notice of any kind, but had hearsay information that a port engineer who had retired early had made some settlement; Rodriguez had no knowledge of any specifics.

a Port Engineer with the following notation: "remained on pension status (option not in file)." Despite their knowledge *in 1976* that Rodriguez had no option notice or option exercise in his file and their contemporaneous determinations to re-open the option opportunity for others who had not been notified, no effort was made by the Trust to repair the damage by (1) correcting the misinformation communicated to Rodriguez by Administrator Killough who had told him, after he had inquired about his rights, that his option had been waived; and (2) notifying him that he had an option and an opportunity to exercise it.

On January 25, 1985, after consulting attorneys, Rodriguez informed the MEBA Trust Administrator that he was intending to retire and inquired about his entitlements. In February, 1985, he was told once more by the Trust's Pension Trust manager that he had waived his rights in June 1968. Rodriguez's counsel made a formal request for review of an anticipated denial of pension benefits. This request was submitted by the Administrator to the MEBA Trust in two meetings, October 1985 and February 1986. It was considered along with the request of another Port Engineer, Frank Peel, who was also receiving a pension after retirement as a seagoing engineer. The Administrator packaged the Peel and Rodriguez requests, and in her reports to the Trust never informed them that Peel, but not Rodriguez, had been served with the notice of option, had exercised it, and had elected to keep receiving his pension check. She merely told them that the Trust "had no record of Mr. Rodriguez electing to suspend his pension benefit" and that Rodriguez never responded to the March 2, 1973 Killough letter.

On March 3, 1986, Rodriguez received notice that his application was again denied. The stated reason was the reason given by the 1973 Killough letter, *viz.*, "that on 'June 16, 1968 you could have elected to have your pen-

sion benefits suspended in which case you could have achieved additional credits. Since you did not so elect you continued to receive pension benefits. . . .'"

After counsel requested again that the Trust articulate its reasons for the refusal, and after being told that the first reason was Rodriguez's failure to exercise his option on June 16, 1968, and the second reason was Rodriguez's failure to answer the 1973 letter, Rodriguez's counsel petitioned the Trust for rehearing. The grounds for the rehearing petition were the failures of the Trust (1) to apply the Trust Regulations as written[5] and (2) to give Rodriguez notice of his option, including the Trust's *mistake* in asserting that Rodriguez had waived his rights on June 16, 1968 (when they never even existed). Rodriguez's Petition to the Trust for rehearing was denied.

Rodriguez filed suit in District Court challenging the Trust's denial of his pension. Both parties agreed that the case was appropriate for decision on cross motions for summary judgment. The District Court, after hearing oral argument, gave an oral decision from the bench. The court held it had no jurisdiction under ERISA to consider this action because Rodriguez failed to satisfy the "act or omission" requirement of 29 U.S.C. § 1144 (b)(1) (1985). While finding that the Trust made no formal decision until 1985, long after ERISA's effective date, and that consequently Rodriguez's cause of action accrued then, the District Court found that the "critical acts or omissions," for ERISA purposes, were the omission of notice in 1969 and the 1973 letter of Administrator Killough. (Pet. 19a). The court found diversity jurisdiction (Pet. 20a), and then found Rodriguez's claim time-

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[5] The Trustees never responded to this argument. Although it formed a significant part of Rodriguez's arguments in his Motion for Summary Judgment, the District Court never adverted to it. Because of its holding on the merits, the Court of Appeals never had to reach it. Thus this point has never been judicially considered.

barred under Maryland law (*Id.*). The District Court said that had it found ERISA jurisdiction, it would nevertheless have supported the Trustees' decision under the arbitrary and capricious standard because the 1973 Killough letter was notice to Rodriguez of his option and it was up to Rodriguez to challenge the Killough decision then (Pet. 22a-23a).

In a unanimous decision, the Court of Appeals reversed. The appellate court found that ERISA is a "comprehensive scheme of national scope designed to supplant diverse state regulation of approved retirement plans." (Pet. 4a). The court affirmed the lower court's finding that the cause of action did not accrue until 1985. It then held that the Trustees' *first* determination to deny Rodriguez his application was a critical act or omission which involved a contemporaneous construction of the plan's provisions (Pet. 6a-7a). The Court of Appeals found the Trust's failure to give Rodriguez notice of his option a clear violation of ERISA (Pet. 9a, 10a)—indeed a clear violation of the Trust's duties even prior to ERISA (Pet. pp. 7a-8a). In rejecting petitioner's basic argument that the fault lay with Rodriguez for not having sought to correct the mistakes of Administrator Killough at an earlier time (although Rodriguez then had no basis to even know that these were mistakes), the Court of Appeals succinctly said:

> "While the MEBA Trust faults Rodriguez for failure to pursue his claim it was the fiduciary's duty to afford him a fair opportunity to do so, not the beneficiary's duty to figure out the fiduciary's mistake." (Pet. 10a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THIS CASE DOES NOT PRESENT THE NARROW ISSUE IN WHICH THERE HAS BEEN A SPLIT IN THE CIRCUITS

A. The Narrow Issue Which Has Split The Circuits

There is a split in the Circuits on a very narrow issue: when an employee retires post-ERISA, applies for benefits post-ERISA, and that application is first denied post-ERISA, does such denial inevitably constitute an "act or omission" sufficient to satisfy the jurisdictional requisites of 29 U.S.C. § 1144(b)(1).[6] Prior to this case, the Third and Seventh Circuits had held that the first post-ERISA determination of a Trust was necessarily such an act or omission: *Tanzillo v. Local Union 617, Int'l Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir. 1985); *Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir. 1985); *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).[7] Prior to this case, the Fourth Circuit's decision in *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977), had left this issue open in that Circuit, because *Martin* involved pre-ERISA employment, retirement, application for benefits, and denial: the only post-ERISA act was the filing of suit.[8] Thus

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[6] 29 U.S.C. § 1144(b)(1) provides: "This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975."

[7] While the *Coward* case uses the words, and searches the facts of record for, "critical acts," the court there held that the "critical acts" are the denial by a Trust of an application for pension benefits (*see* 686 F.2d at 1234).

[8] In similar circumstances, the Second Circuit reached the same decision as the Fourth Circuit in *Martin*, holding that there is no ERISA jurisdiction where the applicant's employment ended pre-

with its decision in this case, the Fourth Circuit joins the Third and Seventh Circuits. Less than a week after *Rodriguez* was decided, the Fifth Circuit joined this group. *Degan v. Ford Motor Co.*, 869 F.2d 889, 894-95 (5th Cir. 1989).

The First and Ninth Circuits have carved out a very limited exception to the application of ERISA in circumstances of post-ERISA employment, application for benefits, and denial thereof. That exception, stated by the Ninth Circuit in *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984), is that when the *only* act during the ERISA period is the denial of the beneficiary's application, *and* when, as a result of acts or omissions occurring entirely before 1975, the trustees have *no discretion* to grant an application, ERISA does not apply:

> Cases such as the one at bar must be distinguished from those in which benefits have been denied as the result of a significant act of discretion under or interpretation of the plan which took place after ERISA's effective date. A plan provision requiring discretion or interpretation does not work to deny an individual benefits until specifically applied to him. A denial of benefits pursuant to such a provision thus operates simultaneously as *both* the event triggering accrual of a cause of action *and* the substantial act resulting in denial of benefits. It would therefore not fall within either clause of § 1144(b)(1), and would under § 1144(a) be subject to ERISA.

Id. at 1502-3. The First Circuit has a similar rule, finding ERISA jurisdiction lacking where absolutely nothing

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ERISA. *La Montagne v. United Wire, Metal & Machine Pension Fund*, 869 F.2d 153 (2d Cir. 1989). The only distinction between *La Montagne* and *Martin* is that in the former, the applicant waited six years, *i.e.*, into the ERISA period, before filing for benefits. In both cases, *all* the employment facts were pre-ERISA.

apart from denial of the beneficiary's application happened during the ERISA period and the trustees' decision was "but the inexorable consequences of acts and omissions taken long before." *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981).

B. The Issue Presented Here

This case does not present the narrow issue which has split the Circuits: *viz.*, does ERISA jurisdiction apply where a post-ERISA denial of benefits involves no discretion or plan interpretation, but is only the inexorable result of all pre-ERISA events? This case is almost the antithesis of that situation. Contrary to Petitioners' repeted characterizations of the 1973 letter as "the Trust's pre-ERISA acts and omissions" (Pet. 11, and see pp. 5, 7-8, 14), the Trust decided nothing in this case *until 1986*. Both the District Court and the Court of Appeals so found (Pet. 7a and 18a). Neither found that the Trust had no discretion to do otherwise: indeed, the Trust never even argued it lacked discretion to decide in favor of Rodriguez.

In this case, *almost every significant act or omission occurred post-ERISA*:

(1) in 1986, the Trust first interpreted its Regulations regarding failure to give notice to Rodriguez and the consequences thereof;

(2) in 1986, the Trust first interpreted its Regulations denying a pivotal Rodriguez argument, namely, that the plain language of the Trust Regulations required grant of the application;

(3) in 1986, the Trust first concocted two new rationales for denying Rodriguez the right to exercise his option over and above the 1973 Administrator's "waiver" rationale—*viz.*, that it was Rodriguez's (a) failure to challenge the 1973 Killough letter, and (b) acceptance of checks during the 1968-1985 period that caused the denial of his

claim. The new rationales (and the facts on which the latter was based) are post-ERISA;

(4) in 1982, officials of the Trust again misinformed Rodriguez, telling him he had waived his rights by failing to exercise his option in June, 1968;

(5) in 1975 and 1976, the Trust permitted two other engineers in Rodriguez's situation to exercise their option, but neglected to initiate the same accommodation for Rodriguez, although it had knowledge that he had inquired about his rights and that Killough had misinformed him. The Court of Appeals found these acts significant (Pet. 10a).

(6) in 1976, the Trust conducted a survey on the very question at issue; located Rodriguez as an engineer who had no option on file; and still failed to give him an opportunity to exercise his option.

This case does not call into issue the narrow *Menhorn/Quinn* exception, and this case raises none of the issues for which this Court's intervention is allegedly sought.

C. Other Non-Issues

Contrary to the Petition (p. 8), the Court of Appeals did not hold "that Federal Courts have jurisdiction to judge pre-ERISA conduct under the standards established by ERISA." What the Court below did hold is that an employee who works 10 years into the ERISA period; whose employer made contributions on his behalf all during that period; who retires in 1985; and whose pension application is decided in 1986 is entitled to have that denial judged under the standards of ERISA, notwithstanding the fact that the Trust initially gave as its reasons for denial their own Administrator's pre-ERISA misinformation. Contrary to the Petition (Pet. 8), the holding below is neither in direct conflict with decisions of the First and Ninth Circuits nor inconsistent with the clear language of the statute. While the Court below de-

clined to carve out the exception created by the First and Ninth Circuits, it would not matter in this case if it had: the Trust had total discretion in 1986, and for the 11 ERISA years that preceded it, to give Rodriguez notice of his option and an opportunity to exercise it. Contrary to the Petition, the decision below has absolutely nothing to do with the jurisdictional issue discussed at length (pp. 11-13) as to whether or not § 302(c)(5) of the Labor Management Relations Act can provide an independent basis of jurisdiction in this case. While §§ 301 and 302 were cited by petitioner as an alternative basis for jurisdiction *if* ERISA jurisdiction were lacking, the decision below found ERISA jurisdiction intact. The court below discussed these sections not to provide additional jurisdictional support, but merely to show that its decision that a pension plan is required to give its participants a full and fair opportunity to exercise options which affect significant changes in their rights existed pre-ERISA under decisions interpreting §§ 301 and 302 of the LMRA (Pet. 9a).

Thus this is not a case in which post-ERISA standards are applied to pre-ERISA conduct in any way, shape, or form. While there may be many interesting issues lurking in this entire field, none are presented by this case.

II. THIS SUIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS

The "act or omission" issue, discussed *ante*, has been referred to as the "second prong" of the ERISA jurisdictional test. The first prong that must be satisfied is the date of accrual of the cause of action. Virtually every ERISA case which has considered this issue, including those on which Petitioners otherwise rely, has come to the same conclusion: a cause of action accrues under 29 U.S.C. § 1144(b)(1) when a pension application is denied. *E.g., Menhorn v. Firestone Tire & Rubber Co.*,

738 F.2d 1496 (9th Cir. 1984); *Quinn v. Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981); *Tanzillo v. Local Union 617, Int'l Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir. 1985); *Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir. 1985); *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977); *Damron v. Sinai Hospital*, 815 F.2d 975 (4th Cir. 1987); *Degan v. Ford Motor Co.*, 869 F.2d 889, 894-95 (5th Cir. 1989); *Paris v. Profit Sharing Plan*, 637 F.2d 357 (5th Cir. 1981), *cert. denied*, 454 U.S. 836 (1981).[9] The Court below so held as did the District Court (Pet. 5a, and 18a).

The rationale for the rule was most cogently stated in the *Paris* case (637 F.2d at 361):

> We agree that a cause of action does not become a presently enforceable demand until a claim is denied. To hold otherwise "would put an almost intolerable burden on employees covered by pension plans. It would require individuals who are unversed in the law to be constantly vigilant. . . . Moreover, claims filed before a pension actually has been denied might be challenged for lack of ripeness. *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947). Requiring piecemeal challenges before an actual denial has occurred would also result in a great waste of judicial resources" *Morgan v. Laborers Pension Trust Fund*, 433 F. Supp. 518, 522 n.5 (N.D. Cal. 1977). We hold that for purposes of ERISA a cause of action does not accrue until an application is denied.

Without citation to any of these uniform authorities, Petitioners attack this rule as contrary to this Court's

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[9] The only exception to the application of this rule which we have found is *Turner v. Retirement Plan*, 659 F. Supp. 534 (N.D. Ohio 1987), a decision which neither distinguished nor even acknowledged the plentiful authority to the contrary.

holdings regarding "stale claim[s] based on a time-barred violation" (Pet. 15) in respect of unfair labor practices and discrimination claims. The question presented, according to Petitioners (Pet. (i)), is:

> May a court sustain a claim for benefits under ERISA where the validity of that claim (asserted within the statute of limitations period) necessarily depends on a determination that an act or omission *outside the limitations period* was illegal? (emphasis in original).

The statement of the issue and the "analogies" presented betray the argument's utter lack of cogency. There was no determination of an "illegal" pre-ERISA act or omission, no violation of a federal statute, nor anything remotely similar. In 1969, a letter that should have been delivered was not. In 1973, a letter that should not have been written was. Although these acts and omissions were found to constitute fiduciary mistakes, they were not held to be "illegal" in any sense. No court—certainly not the District Court—said the Administrator's 1973 letter was "illegal." The analogy of which Petitioners speak, and the question they pose, is not even remotely in the ballpark.

III. THE RULE ENUNCIATED BY THE COURT BELOW IS THE MAJORITY RULE AND IS CORRECT

Even if, *arguendo*, this case turned on application of the First and Ninth Circuits' exception, which it does not, the rule enunciated by the Third, Fourth, Fifth, and Seventh Circuits is clearly the better rule.[10] The pain-

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[10] We note *Menhorn* was a 2-1 decision, with a strong dissent on the ERISA jurisdictional holding. By contrast, *Jameson*, *Tanzillo*, *Reiheizer*, *Coward*, *Degan*, and *Rodriguez* were all unanimous opinions on the jurisdictional issue.

The Eighth Circuit's decisions, *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979), and *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980), basically

staking investigation into whether, or to what extent, Trustees' post-ERISA denials are based on pre-ERISA events serves only to create confusion and uncertainty in the field of pension rights and obligations, and raises the host of jurisdictional issues with which the District Court grappled when it determined that the "act or omission" criterion was not satisfied here. As the Court below held, its rule has the advantages of certainty and equity (Pet. 6a). It is 1989, 14 years into ERISA.[11] Both the court below and the *Degan* court were correct in holding that their view of ERISA jurisdiction conforms to Congressional purposes.

IV. THIS CASE WAS CORRECTLY DECIDED

Rodriguez is currently receiving a pension of $390.66 per month. If he were to be credited for all of the time he has worked since his job became unionized for which *employers were making contributions on his behalf*, he would be entitled to a pension of over $3,000 per month. The sole basis on which this pension was denied to him by the Trust was his failure to exercise an option of which he had never been given notice.

The Trust has never denied that it had an obligation to give Rodriguez notice of his option. The Trust argued

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apply the same rule as that enunciated by the Third, Fourth, Fifth and Seventh Circuits but reach the result by a different path. These cases interpret § 514(b)(1) of ERISA as permitting the court to apply state law to pre-ERISA conduct when both pre- and post-ERISA conduct is involved, and when such application would be most fair. Neither cited case suggests that federal court jurisdiction is defeated merely because significant or critical pre-ERISA conduct is also involved. *Winer*, 593 F.2d at 313-14; *Landro*, 625 F.2d at 1351-1352.

[11] The rule need not apply where *all* employment facts are pre-ERISA, and the only thing that occurs in the ERISA time period is the filing of an application. Indeed, the Fourth Circuit in *Martin*, *supra*, p. 9, and the Second Circuit in *La Montagne*, *supra*, pp. 9-10 and n.8 showed that it would not.

below that the letter informing Rodriguez that he had forever waived his rights constituted such notice. This disingenuous position was soundly rejected by the Court below. Here, the Trust sounds a variation of this theme: that Rodriguez seeks an edge by making his election at a time when all risk runs in his favor. The short answer to this argument is that Rodriguez tried to accrue further credits in *1973*, but Killough's misinformation would not let him. Another answer is that the Trust had full opportunity to afford Rodriguez that option in 1976, when they did so for other employees and knew he fell into the same classification, again at a time long in advance of Rodriguez's retirement, and when all risks did not run in his favor.

The Trust's 1986 determination that Rodriguez had forever waived his rights to exercise the option contained in the Plan Document by not challenging the Killough letter in 1973 was the most significant possible "act" of the Trust under § 514(b)(1), and was made post-ERISA. The Court of Appeals decision was correct.

CONCLUSION

The Petition for Certiorari of MEBA Pension Trust, *et al.* should be denied for the above stated reasons.

Respectfully submitted,

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